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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1160

RANDOLPH PHILLIPS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND THE UNITED CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 143), affirming two orders of the Securities and Exchange Commission under Section 11 (e) of the Public Utility Holding Company Act of 1935 which authorized and directed The United Corporation to effect a plan for the retirement of a portion of its preferred stock, is reported at 153 F. (2d) 27. The findings and opinion of the Commission (R. 12), dated November 24, 1944, have not yet been officially reported but

are set forth in the Commission's Holding Company Act Release No. 5440.

JURISDICTION

The decree of the Circuit Court of Appeals for the Second Circuit was entered on January 31, 1946 (R. 152). The petition for a writ of certiorari was filed on April 26, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTIONS INVOLVED

1. It being conceded that the Commission may approve a plan under Section 11 (e) of the Holding Company Act without requiring the proponent company to obtain such stockholders' authorization as is alleged to be required under state law, is that power dependent upon district court enforcement of the plan where the company does not request court enforcement and is in fact able to consummate the plan without court enforcement?

2. Did the court below err in failing to set aside the action of the Commission approving as "fair and equitable" and "necessary" a plan submitted by a holding company under Section 11 (e) which provided for substantial partial compliance with Section 11 (b) and an earlier Commission order

thereunder, after rejection by the Commission of a minority stockholder's request that the Commission condition its approval upon amendments to the plan designed to effect certain immediate changes in voting rights which, by injecting new issues, might well have delayed accomplishment of partial compliance?

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79 *et seq.*), are set forth in the Appendix, *infra*.

STATEMENT

The United Corporation,[1] a Delaware company, is a registered holding company, having outstanding two classes of stock, preference and common (R. 12–13). Petitioner is a common stockholder of United.[2]

On August 14, 1943, the Commission entered an order pursuant to Section 11 (b) requiring

[1] Herein sometimes referred to as "United."

[2] In the administrative proceeding and in the court below petitioner claimed also the right to speak for preference stockholders by reason of having solicited proxies of both common and preference stockholders in connection with the election of directors for United. While the proxy statement expressly stated that the proxy "will not be used to represent you before the Securities and Exchange Commission, nor in any proceeding in any Court" (R. 93), petitioner claims that it was nevertheless contemplated that he would act in his own name to represent the interests of both common and preferred stockholders (Pet. 6).

United to simplify its corporate structure so as to consist of a single class of stock, namely, common, and to cease to be a holding company (R. 12–13, 144). Petitioner did not participate in the proceedings which led to that order and states that he has "at no time" complained thereof (Pet. 7).

Thereafter United filed with the Commission a plan of partial compliance with that order and Section 11 (b) (R. 12–13). The plan, as amended, was approved in the second order of the Commission (R. 61). The plan offered United's preference stockholders in exchange for their holdings a "package" consisting of common stock of Philadelphia Electric Company and cash in an amount sufficient, if completely accepted, to retire approximately 45% of the outstanding preference stock. Complete acceptance would in turn result in the divestment of approximately 38% of United's assets, computed on the basis of current market values including virtually complete divestment of United's holdings in one of its largest subsidiaries, Philadelphia Electric Company (R. 13–15, 37, 147–8; 2).

Hearings were held to determine whether the plan met the statutory requirements of Section 11 (e), namely, whether it was "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan." (R. 2, 9, 13, 110, 150–151). Most of the

voluminous administrative record was directed to an appraisal of whether the "package" would be the equitable equivalent of the rights surrendered.[3] In approving the plan, as amended, the Commission found it fair and equitable (1) to preference stockholders who might accept the offer of exchange, (2) to preference stockholders who might elect not to accept, and (3) to holders of common stock (R. 33–5). Petitioner's objections before the Commission were not specifically addressed to the financial analysis upon which the Commission based its conclusions as to the fairness of the plan. Indeed, he attacked the plan as prejudicial to the interests of both preference and common stockholders and challenged the propriety of considering whether the plan was "fair and equitable" to preference stockholders who might accept the offer[4] (R. 31–3). Petitioner's theory was that since the transactions included in the plan would be subject to Commission authorization under sections of the Act other than Section 11 (e) (for example Sec-

[3] Criticism on the part of members of the Commission's staff of the plan as originally presented was particularly directed to the question whether preference stockholders who might accept the offer would receive sufficient consideration for the preferential claims which they would thereby surrender. Company amendments in response to staff and Commission criticisms increased the attractiveness of the offer from the point of view of preference stockholders.

[4] In the court below petitioner unsuccessfully urged that the subsidiary findings of the Commission were insufficient to support its conclusion as to the fairness of the plan, a point not now pressed (R. 147).

tion 12) the standards set forth in those sections should be applied to the exclusion of the standards of Section 11 (e), and that the proper measure of equivalence of the exchange offer should be the "law of the market place," *i. e.*, the least attractive offering likely to induce exchanges, rather than an appraisal independent of such a market criterion as to whether what was offered under the plan was the equitable equivalent of the rights surrendered.[5] On the other hand, petitioner urged that for purposes of Delaware law the plan involved a dissolution or reorganization requiring submission to stockholders rather than a partial sale of assets and retirement of preferred stock, neither of which required a stockholders' vote. Inasmuch as Section 11 (e) expressly authorizes plans "for the divestment of control, securities, or other assets, or for other action * * * to comply with the provisions of subsection (b)," the Commission concluded that the instant plan was within the scope of Section 11 (e) and subject to the fair and equitable standard therein contained, although it disagreed with petitioner's views as to the applicability of Delaware law.[6]

[5] The current market value of the "package" was in excess of the then market value of United's outstanding preference stock although less than the amount of the liquidation preference of the preference stock. The Commission's measure of equivalence was similar to that considered by this Court in *Otis & Company* v. *Securities and Exchange Commission*, 323 U. S. 624 (R. 33–5).

[6] In charging the Commission with inconsistency (Pet. 11–12) petitioner overlooks the much broader scope of the

The petition for review urged that the Commission orders complained of should be "set aside * * * in their entirety, or [that the court below should] direct their modification as * * * requested" in the petition (R. 5). Petitioner's suggested modification of the approved plan included proposals that:

> (1) It be approved by a vote of the Preference and common stockholders;
>
> (2) acceptance not be optional with the Preference stockholders constituting only 45% or less of the total outstanding Preference stock and * * * each and every Preference stockholder be bound to accept the Plan in equal degree and effect;
>
> (3) cumulative voting be instituted at all elections of directors, a quorum requirement of 50% of the outstanding voting stock be instituted for all meetings of stockholders in place of the present 25% quorum requirement; and * * * adequate representation be granted on the Board of Directors to representatives of the more than 18,000 stockholders who voted at the 1944 Annual Meeting in opposition to the incumbent management; and
>
> (4) a dividend of $3 a share be paid to each of the non-assenting shares of Preference stock upon completion of the Plan (R. 3–4).

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language in Section 11 (e) as compared to the concept of reorganization contained in the Delaware law.

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The Commission entered its approval order on November 29, 1944 (R. 61). The terms of the plan required a fifteen-day period for acceptance of the exchange offer plus additional delay incident to the mechanics of mailing the offer (R. 37). The petition for review was filed on December 4, 1944 (R. 1–5). Immediately upon filing the petition for review petitioner moved for a stay of the orders complained of (R. 10). Argument on the motion for stay was held on December 11, 1944, and included argument on the merits of the plan. At the argument on the stay the Commission in its memorandum took the position that "denial of a stay would be tantamount to denial of further opportunity for review" since it would be impractical to set aside the transaction after acceptance by numerous security holders involved. It was also pointed out that any requirement of a bond to compensate United Corporation for delay would be an impractical burden to impose upon the petitioner, since his potential liability would far outweigh his individual interest in the plan. Accordingly, the Commission stated in its memorandum: "if the Court should conclude that petitioner's objections have substantial basis and cannot be disposed of summarily, then we would agree that a stay would be appropriate."[7]

[7] The Commission summarized its position thus:

"Since denial of a stay foreclosures further opportunity to give petitioner judicial relief for alleged grievances, and

In a decision rendered on December 15, 1944, without opinion, the court below denied a stay. On December 19, 1944, the transactions authorized and directed by the Commission's order were consummated (R. 10). Thereafter the case was briefed and argued on the merits with only oblique references to the problem of mootness.[8]

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since the granting of a stay may prove burdensome to United without possibility of redress, the question of whether or not a stay should be granted necessarily resolves itself into a summary inquiry into the merits of the contention raised by the petitioner. It is our position that petitioner has not made out a substantial basis for setting aside the order complained of. If the Court agrees with our position in this respect we submit that a stay should be denied. If the Court should conclude that petitioner's objections [to the Commission's order] have substantial basis and cannot be disposed of summarily, then we would agree that a stay would be appropriate" (p. 2).

[8] Petitioner apparently recognized the impracticability of setting aside the transactions covered by Commission's order, but stated that the issues were not moot since the directors of United might be liable to the corporation for damages if the Commission's orders, pursuant to which they acted, should be set aside or modified on review. Both the Commission and United Corporation limited their arguments to the issues on the merits, although doubts were expressed as to petitioner's assumption that United's directors would be liable if the order were set aside. See the provision in Section 24 (b) of the Act that—

"The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

See also the last sentence of Section 20 (d) which provides that—

"No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, not-

The opinion of the court below sustained the Commission order on the merits, rejecting all objections urged by petitioner.

ARGUMENT

The decision below is correct and does not warrant further review by this Court. There is no conflict in the circuits. In fact, we are aware of no case in which the arguments now advanced by petitioner have been made. Petitioner's arguments stem from a misapprehension of the scheme of the Act and a misunderstanding of Commission and court decisions which he interprets as inconsistent with the decision of the court below.

1. There was no legal necessity for a vote. Petitioner contends that the action contemplated by the plan would, apart from the Act, require a stockholder vote under Delaware law. This view of Delaware law was disputed by United Corporation and rejected by the Commission (R. 32). But the Commission regarded the issue with respect to state law as irrelevant in view of the overriding requirements of paramount federal law. The court below, while indicating that United's view as to Delaware law was argued "with force" (R. 144), rested its decision exclusively on the absence of any requirements for

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withstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

a vote in Section 11 of the Holding Company Act (R. 145). Petitioner concedes that Section 11 of the Act does not require a vote even where state law would otherwise require a vote upon the transactions proposed in a plan of compliance (Pet. 12, 14). Petitioner nevertheless argues that the only way in which the Holding Company Act may operate to displace such an inconsistent requirement of state law is through a decree of a federal district court in an enforcement proceeding pursuant to Section 11 (e) (or Section 11 (d)).

Petitioner points to no language in the statute which could be so construed. Section 11 (e) permits a company, in anticipation of the compulsions of Sections 11 (b) and (d), to "submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling" the company to comply with Section 11 (b). The Commission, after notice and opportunity for hearing, is authorized to consider whether the plan is "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan," and, if the Commission so finds, "the Commission *shall* make an order approving such plan." Section 11 (e) further provides that where the Commission has approved a plan of compliance "the Commission, *at the request of the company, may* apply to a court, in accordance with the pro-

visions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan." (Italics supplied.) Apart from the seemingly deliberate use of the words "shall" and "may" in different connections in the same sentence, enforcement is clearly conditioned upon the request of the proponent company.

Furthermore, as the circuit court pointed out (R. 146), Section 18 (f), under the provisions of which the Commission would apply for a court order enforcing a Section 11 (e) plan, explicitly states that the Commission "may in its discretion" bring an action in the proper district court.[9]

The United Corporation has not requested the Commission to apply to a federal district court for enforcement of the plan. Under such circumstances there is no need for the Commission to seek enforcement of its order in a court.[10]

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[9] Similarly, against the contingency that a corporation may refuse to comply voluntarily with an order of the Commission under Section 11 (b), Section 11 (d) provides that the Commission may apply to a court for enforcement.

[10] We do not mean to imply that the Commission might not, depending of course upon the nature of the plan, condition its approval upon a request for court enforcement where, for example, an enforcement decree might be necessary to prevent discriminatory treatment as between different security holders of the same class. Petitioner, however, makes absolutely no showing of any necessity for court enforcement to prevent a result contrary to the policy of the statute.

If United and the Commission had been convinced of the substantiality of petitioner's point that a vote would be necessary to authorize the transactions under Delaware law and

The court below effectively disposed of petitioner's contention thus (R. 146–147):

> * * * avoidance of unnecessary court action would suggest that litigation should not be forced upon the Commission and the company when neither finds it necessary, the general provision for review given a person aggrieved [Section 24 (a)] being adequate protection to dissenters. And in the face of the very clearly permissive wording of the statute, we are not disposed to strain for an interpretation of the statute which will force unneeded enforcement proceedings. We do not believe this choice of language can be considered inadvertent; in fact, the general provisions for enforcing compliance with the Act and regulations and orders thereunder, § 18 (f), seems unusually explicit, stating that the Commission 'may in its discretion' bring an action in the proper district court. Here the Commission has not applied for enforcement under (d), nor has United asked for action under (e). Hence the terms of the statute do not apply, and the petitioner's rights are safeguarded by his present petition * * *.

Petitioner expresses a preference for presenting his objections to the plan in a district court

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had anticipated obstructive action in the state courts based upon such a contention, it is entirely possible that enforcement proceedings in a federal district court would have been requested and instituted in order to obtain an injunction from the enforcement court.

enforcement proceeding rather than utilizing the processes of direct review of a Commission order in a circuit court of appeals. Apart from the fact that the statute does not offer the objector such a choice of forums, the reasons given for his preference are without substance. One reason given by petitioner is that the district court enforcement hearing would, he assumes, necessarily precede execution of the plan,[11] while Section 24 (b) leaves it to the discretion of the reviewing courts whether or not to stay a Commission order pending review. It is of course true that one procedure for consummation of a plan may prove more expeditious than another depending upon the nature of the plan involved, but surely an objecting security holder can have no valid objection to allowing the proponent of a plan a choice of procedure so long as either alternative affords dissenters adequate opportunity for judicial review.[12] The problem of exercising dis-

[11] This assumption is not necessarily correct in all cases. It may be that where a plan approved by the Commission, whether or not affirmed on review, has been completely executed, a district court enforcement proceeding would nevertheless be warranted as a means of enjoining collateral attack on the plan.

[12] Where a plan by its terms is to be effective only after approval and enforcement by a district court under Section 11 (e), the consequence is to render inapplicable the procedures for direct review of Commission orders in the circuit court of appeals pursuant to Section 24 (a). *Lownsbury* v. *Securities and Exchange Commission*, 151 F. (2d) 217 (C. C. A. 3), certiorari denied January 2, 1946, No. 601, this

cretion whether or not to stay a plan pending judicial consideration of objections thereto cannot be avoided under either procedure since even where there is an enforcement proceeding objectors will not necessarily be satisfied with a district court ruling as to the fairness of the plan, and may seek to stay consummation of the plan if they appeal from the enforcement order of the district court. Petitioner's contention as to the inadequacy of the opportunity for judicial review under Section 24 (a) is based upon the unsupported assumption that the circuit courts of appeals cannot be trusted to exercise a sound discretion in determining whether to grant or withhold stays as contemplated by Section 24 (b). Petitioner cannot, in any event, point to any abuse of discretion by the court below. While the court below issued no opinion in connection with its denial of a stay, the denial of a stay was after full argument on the merits of petitioner's objections and in the face of affirmative suggestions by the Commission that a stay would be appropriate if the court felt that petitioner had raised any objections not susceptible of summary dis-

Term; *Okin* v. *Securities and Exchange Commission*, 145 F. (2d) 206 (C. C. A. 2), remanded in part on other grounds, 325 U. S. 840. In these cases the dissenting security holders indicated a preference for filing direct petitions for review of the Commission's order in circuit courts of appeal as against voicing their objections in the enforcement court and appealing from any adverse order therein.

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position [13] (see pp. 8–9, *supra*). The subsequent opinion indicates that the court did in fact consider his objections without merit.

Petitioner makes the further claim that a district court enforcement proceeding would be more advantageous to him because it would give him an opportunity to suggest to the district court an alternative plan more to his liking than the plan proposed by the company. This argument is based upon a misapprehension of the scope of Section 11 (e) which provides only that any "registered holding company or any subsidiary company" may submit a plan to the Commission, and that if the Commission shall approve such a plan it may be enforced at the request of the company. Individual security holders have standing of course to be heard before the enforcement court as well as before the Commission for the purpose of voicing their opposition to the company's plan. While it is true that one method of arguing in opposition to the company's plan is to suggest a better one, the ultimate issue before the Commisssion must be whether the company's plan meets the statutory test. The

[13] As partially indicated by the excerpt from the Commission's memorandum in connection with the motion for stay quoted by petitioner (Pet. 11), the Commission urged the Court to treat the proposal as in effect a reorganization. This thought was advanced both with reference to the court's exercise of discretion with respect to the granting of a stay, and also in justification of the Commission's application of the fair and equitable standard of Section 11 (e).

issues which may arise on review are similarly limited whether review takes place in the enforcement court or in a circuit court of appeals. The only question before either court would be whether the Commission's approval of the company-proposed plan is warranted by the record, not whether the court might prefer some alternative suggested by an objecting security holder.[14]

Whatever might be said as an abstract proposition in favor of affording minority security holders the same powers of initiation as are conferred upon the management by Section 11 (e), Congress appears to have deliberately rejected

[14] Contrary to petitioner's contention (Pet. 24) the statute does not call for a hearing *de novo* in the district court enforcement proceeding. The language of Section 11 (e) calls only for a "hearing" by the court, which on familiar principles of administrative law means a review of the Commission's determinations based upon the evidence before it. Cf. *Reconstruction Finance Corporation* v. *Bankers Trust Company*, 318 U. S. 163, 170 in which the court said, with reference to Interstate Commerce Commission approval of reorganization fees, "Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law". The practice under Section 11 (e) has been to proceed on the basis of the administrative record before the Commission. *See Application of Securities and Exchange Commission in re Columbia Oil and Gasoline Corporation*, 50 F. Supp. 965 (D. Del.); *In re Jacksonville Gas Corporation*, (S. D. Fla., 1942, unreported); the subsequent opinion of the court approving the plan is reported at 46 F. Supp. 852).

that course in the hope of expediting compliance.[15] As we have seen (*supra*, pp. 11–13), Section 11 (e) expressly makes court enforcement dependent upon the request of the company and does not give dissenters an election to compel a hearing in a district court. Where they do not have such a hearing they have judicial review as provided in Section 24.

2. Contrary to petitioner's assertions there is presented here no conflict between different circuit courts of appeals. Petitioner's argument of inconsistency between the procedure followed in this case and that followed, or indicated as applicable, in other cases rests simply upon a failure to appreciate the latitude which the statute gives

[15] Cf. *Price* v. *Gurney*, 324 U. S. 100. Section 11 (d), unlike Section 11 (e), does afford an avenue for court enforcement of plans "which shall have been approved by the Commission after opportunity for hearing" and which may have been proposed by the Commission itself or by a person "having a bona fide interest * * * in the reorganization." However, it is in the discretion of the Commission when to abandon hope of achieving compliance with the statute through the Section 11 (e) route of voluntary cooperation with the holding company managements and to invoke the compulsive procedures provided in Section 11 (d). Section 11 (e) became operative in 1936. The Commission was not authorized to institute compulsive proceedings until 1938, did not in fact institute Section 11 (b) proceedings against the major holding company systems until 1940, and has not as yet had occasion in any case to propose its own plan for enforcement under Section 11 (d).

for adapting procedure to the practical requirements of the Commission's administrative task.[16]

The fundamental purpose of Section 11 (e) was, as indicated by the committee reports, to enlist, with appropriate administrative safeguards, the aid of the holding company managements in taking the holding company systems apart. As Congressman Eicher stated:

> If the compulsions of the act are made sufficiently clear to convince the interlocking lawyers of the holding-company bankers that it can't be evaded or compromised, the legal and economic imagination which put these holding-company combinations together will devise many means of taking them apart. [H. Rep. No. 1318, 74th Cong., 1st sess., at p. 50.]

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[16] Petitioner cites various proceedings to establish the proposition that "this is believed to be the first time it [the Commission] has endeavored to effect a plan of reorganization without requiring, *when requested*, a stockholders vote or a District Court proceeding." (Pet. 24n.) Inasmuch as the Commission has never, after approving a plan, refused a proponent company's request to institute a district court enforcement proceeding, the proposition stated by petitioner is completely irrelevant to the questions raised in his petition. If, however, petitioner would have the Court understand that it has been the practice of the Commission to institute enforcement proceedings or to require a stockholders' vote, at the request of a dissenter, there is no case in which any such request has been granted. In fact we are aware of no other case in which a dissenter has urged that a district court proceeding should be had.

As this Court noted in *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80, 91, the result of the procedures afforded in Section 11 (e) is to give the holding company managements a large measure of control over the timing and initiation of plans of compliance.[17]

The language from the *Commonwealth and Southern* opinion relied on by petitioner also refers to the intention of Congress "to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate." See the excerpts from that opinion quoted by petitioner, Pet. 26, 27. With respect to the bearing of that case on the validity of the Commission's order, the court below stated (R. 147): "There is certainly nothing to the contrary, if indeed there is not support, in the general statements in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission,* 3 Cir., 134 F. 2d 747, 751, so much relied on by petitioner, where the point was not in issue."

Nor is there any administrative inconsistency in approving the instant plan without insisting

[17] This power is, of course, subject to the requirement that the Commission and reviewing courts be satisfied as to the fairness of the plan and to the residual power of the Commission or interested security holders to initiate their own plans in a Section 11 (d) proceeding if the holding company management fails to come forward with plans satisfying the statutory standards. See n. 9, 15, pp. 12, 18, *supra.*

upon compliance with alleged state law requirements as to stockholders' authorization. Company plans proposed under Section 11 (e) have, as anticipated, taken a great variety of forms and have relied upon different mechanics of execution. At a period when a large proportion of the industry was resisting compliance with Section 11 (b) the Commission did not question the propriety of including in some of the earlier Section 11 (e) plans provisions for stockholders' votes. Nevertheless, the dilatory possibilities of such provisions were revealed by experience,[18]

[18] One experience prior to the United plan is worth noting. A plan of dissolution for one company was by its terms dependent upon stockholder authorization pursuant to Delaware law. After a meeting at which the company claimed to have obtained a favorable stockholders' vote, objectors raised technical questions as to the validity of the meeting under state law and also claimed that there had been misrepresentations in oral solicitations in support of the plan. Effort was made to delay enforcement of the plan pending an examination of the numerous stockholders who voted for the plan covering such oral representations. The dilatory possibilities of the inquiry were obviated by a ruling of the court that the voting provision of the plan, being irrelevant to the statutory scheme, need not be insisted upon. The district court entered an order enforcing the plan upon being satisfied that it was "fair and equitable" and "necessary", and declined to rule upon the legality of the vote under state law. See *Application of Securities and Exchange Commission in re Columbia Oil & Gasoline Corporation*, 50 F. Supp. 965 (D. Del.) The same plan had previously been upheld upon review of the Commission's order pursuant to Section 24 (a). See *L. J. Marquis & Co. v. Securities and Exchange Commission*, 134 F. 2d 822 (C. C. A. 3).

and the point of view developed among the staff of the Commission that provisions for submitting a plan to a vote might be provocative of unnecessary delay. In consequence the proposal of such a plan might well raise questions as to the diligence of the holding company management in complying with an outstanding Section 11 (b) order. This point of view was reflected in the preliminary discussions as a result of which United's management was persuaded to eliminate the voting provisions here in question. The supposed administrative inconsistency relied upon by petitioner reflects either varying reactions to different practical problems or shows merely that the Commission has profited from experience.[19] In view of the nature of the problems presented,

[19] In the court below petitioner made much of the fact that although the Commission rejected his arguments for requiring that United's plan be submitted to security holders, it subsequently approved a plan of compliance by the Commonwealth & Southern Corporation which did contemplate a stockholders' vote (not the vote which would be necessary under Delaware law but merely the affirmative authorization of the majority of each class of stock actually represented at a meeting to consider the plan). *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5895 (June 30, 1945). This order, however, was subsequently modified so as to eliminate approval of the provision in the plan with respect to votes, when four months later the plan had not been submitted to the stockholders and the dilatory consequences of the voting provision in the plan had been forcefully brought to the Commission's attention. See *The Commonwealth & Southern Corp.*, Holding Company Act Release No. 6177 (November 1, 1945).

it is unlikely that any helpful clarifications of practice would be afforded by a ruling of this Court upon such essentially administrative considerations.

3. Petitioner asserts as his second ground for certiorari the circuit court's refusal to modify the Commission's order approving the plan by adding certain new conditions which the Commission had previously rejected (Pet. 2, 29–33). The conditions which petitioner proposes be engrafted on the plan would require cumulative voting for directors, raise the quorum requirements for stockholders' meetings, and give "adequate representation" on the board of directors to those opposition stockholders who gave proxies to the petitioner. He asserts that these amendments are necessary to effect a fair and equitable distribution of voting power under Section 11 (b). In answer to this contention we quote below what the Commission stated in its opinion with reference to these proposed amendments:

> We do not disapprove the principles underlying cumulative voting and adequate quorum requirements, but however sound they may be in principle we do not consider the suggestions germane to the issues before us. Possibly in a different kind of proceeding these or similar requirements, if appropriate, might be imposed by our order. In our opinion we would not be warranted in imposing them as conditions to an order upon the present Plan which, as we have already

> noted, contemplates partial effectuation of the provisions of Section 11 (b) but leaves many problems thereunder (including the existing maldistribution of voting power) unsolved." (R. 33.)[20]

Petitioner's argument at this point seems to amount to urging either that the circuit court of appeals should not have permitted the Commission to accept plans of partial compliance, or possibly that the court should have displaced the function of both the administrative agency and the proponent company by rewriting the plan to incorporate the changes favored by petitioner. Either alternative seems to us inconsistent with the statutory scheme.

Petitioner urged in the court below that he had been denied procedural due process because of certain discussions prior to the filing of the plan between the management of United and members of the Commission's staff and/or of the Commission concerning the undesirability from the Commission's point of view of making the plan subject to a stockholders' vote. While the Commission permitted the petitioner to brief and argue his objections to the plan, he claimed that

[20] In this connection the circuit court stated: "His proposals * * * had no bearing on the approval of the present plan; and the Commission was justified in declining to consider them at this time. In fact, they appear designed to secure for petitioner that position in company affairs for which he waged a proxy battle only to lose it at the company's annual meeting." (R. 151.)

the earlier discussions prevented the Commission from considering his objections with an open mind. The court below fully considered and rejected this objection of petitioner's (R. 150–151).

Although petitioner purports to accept this ruling of the court below (Pet. 23) and expressly states that he "does not raise here the question of whether the pre-hearing actions of the Commission deprived him of a fair and impartial hearing on this issue," he devotes a substantial portion of his petition to factual statements and insinuations apparently intended to raise questions on this score. These are presented to the Court as "background." While petitioner expressly disclaimed making an issue of these procedural considerations we do not wish to leave his statement thereon unchallenged.

Answering these objections the court below recognized the necessity for informal conferences such as occurred in this case if "all the intricate details involved in even a simple holding company simplification is to be carried to completion within the time of man" (R. 151). While Commission knowledge of specific differences of viewpoint between the holding company managements and their stockholders would not obviate the necessity for such conferences, it should be noted that in this case petitioner's attempt to show procedural unfairness to him obscures the time sequence of the events related. Thus all of the conversations referred to by petitioner took place prior to the filing of the plan now under review and prior

to petitioner's having entered an appearance in any proceeding in respect to United under the Holding Company Act. Petitioner's only reference to the timing of these conversations in relation to his evincing an interest in the matter is the statement that his objection should have been anticipated because "the Commission knew there had been a proxy fight and that the management's plans would in all likelihood be contested" (Pet. 20–21).

Petitioner conducted proxy fights against the management of United in both 1943 and 1944. Both contests were spirited and resulted in charges and counter-charges. In connection with the 1943 contest the Commission filed a bill in the United States District Court for the District of Delaware charging United's management with violation of its proxy rules.[21] *Securities and Exchange Commission* v. *The United Corporation et al.*, Civil Action No. 298 (1943). After denial of a temporary restraining order by the court the election was held, and the Commission's bill was thereafter dismissed pursuant to a stipulation in which United agreed to adhere in the future to the Commission's interpretation of the proxy rules in question.[22]

[21] The alleged violation included the failure of United's management to make it possible for petitioner's proxy soliciting material to reach the beneficial owners of securities held in "street names," who had been solicited on behalf of the management.

[22] This was after informal check to the satisfaction of the Commission that the alleged violation would not have affected the result.

In connection with the second proxy fight petitioner distributed a letter charging United's management with a gross breach of faith toward its stockholders because its plan as filed contained no provision for a vote of stockholders and because of a prior announcement by United's management that it intended to include a provision for a stockholders' vote in such plans of compliance, then contemplated, as might be filed. Under the circumstances the Commission considered it only fair that United's management be permitted to disclose in a reply statement that the omission of the provision for a vote was in response to suggestions emanating from the Commission. In his brief in the court below and in his petition here petitioner has laid great emphasis upon supposed inconsistencies between this letter of United's management, statements made at the stockholders' meeting when United's President was heckled by petitioner, and a reference to this point in the opinion of the Commission. These differences relate to whether the suggestion in question came from a Commissioner or members of the staff, or both. Any fuzziness of the record on this point is attributable to the fact that while the Commission's trial examiner admitted in evidence the minutes of the stockholders' meeting and the letters, he held that petitioner should not be permitted to conduct an examination for the purpose of exploring prefiling conversations with respect to the plan.

From the Commission's point of view the question is irrelevant. It is a matter of common knowledge that members of the Commission as well as the staff have at all times made themselves available for informal discussions with holding company managements and security holders or their representatives in an effort to facilitate compliance with the Act. As stated in our brief in the court below, "the extent to which such discussions may be limited to the members of the staff, individual Commissioners, or the Commission itself, is largely determined by the amount of time which the Commissioners themselves can afford to devote to preliminary discussions" in view of their manifold responsibilities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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